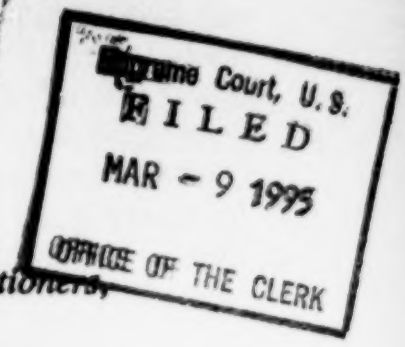
No. 94-818

(3)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994




HERCULES INCORPORATED
and
WM. T. THOMPSON COMPANY,
*Petitioners,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

HERBERT L. FENSTER *
HUGO TEUFEL
SCOTT S. EVANS
RAY M. ARAGON
MCKENNA & CUNEO
370 17th Street, Suite 4800
Denver, Colorado 80202
(303) 634-4000

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*Attorneys for Amicus Curiae The Chamber of Commerce of the United States of America*

* Counsel of Record

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## QUESTIONS PRESENTED

1. Whether Section 707 of the Defense Production Act of 1950 (the "DPA"), 50 U.S.C. app. § 2157, which mandates that a contractor shall not be liable for "damages . . . for any act or failure to act" resulting from compliance with orders under that Act, shields government contractors from damages incurred as a result of mandatory work ordered to be performed by the government.

2. Whether the Federal Circuit's limited view of the indemnification provided by Section 707 is fundamentally inconsistent with the government contractor defense created by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which protects government contractors from third-party tort claims, and the protections afforded in *United States v. Spearin*, 248 U.S. 132 (1918), which also protects contractors from the results of faulty government specifications.

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## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

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### STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federal association of businesses, companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 215,000 businesses and organizations. It is the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States. The Chamber seeks to advance those interests by filing briefs in cases of importance to the business community. Among the Chamber's constituencies is a core of businesses which contract with the United States.

The decision of the United States Court of Appeals for the Federal Circuit in the instant case has serious adverse

implications for large and small corporations alike. The decision below is of great concern to the Chamber's members in that it allows the government to escape liability for the consequences of its actions in entering into mandatory contracts for hazardous materials which are critical to the implementation of important public policy goals, and thrusts upon private parties the costs of its actions. The Chamber believes it is important for this Court to recognize the significance of this issue to the business community.

Permitting government-caused tort liability to be imposed on government contractors raises serious legal and constitutional concerns, since this liability is neither bargained for nor avoidable by government contractors. In the Chamber's view, such liability is wholly inconsistent with existing doctrines protecting government contractors from contractual and third party tort liability for actions dictated by the government through mandatory contracts. It is also inconsistent with the expressed will of Congress embodied in Section 707 of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2171 ("DPA"). Because the Federal Circuit's interpretation and application of contract law and the government contractor defense issue are in conflict with applicable decisions of this Court, the Court should grant the petition for a writ of certiorari.[1]

## SUMMARY OF ARGUMENT

1. The history of the DPA illustrates that Congress intended to indemnify contractors for the consequences of producing material for use in defense of the nation. Section 707 of the DPA indemnifies the Petitioners for the consequences of contracts entered into pursuant to the DPA, including damages in tort.

2. The Federal Circuit's misapplication of Section 707 is wholly inconsistent with the government contractor defense enunciated by this Court in *Boyle v. United Tech-*

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[1] The petitioners and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

*nologies Corp.*, 487 U.S. 500 (1988), which shields government contractors from third party tort liability for work performed pursuant to government contract specifications, and the doctrine of *United States v. Spearin*, 248 U.S. 132 (1918), which likewise protects government contractors from the effects of faulty or harmful government contract specifications.

## REASONS FOR GRANTING THE WRIT

The petition at bar concerns the protections afforded to government contractors performing important though sometimes hazardous public policy goals. Concomitantly, the petition concerns the extent to which the federal government can avoid liability for contracts which it has imposed upon private entities. The protections afforded to government contractors are broader than the limited and internally inconsistent view of government contract indemnity adopted by the Federal Circuit.

The decision below would allow the government to escape the consequences of having compelled petitioners to produce a material, Agent Orange, that the government knew was potentially hazardous, and then knowingly exposing service personnel to that material.

While it is well-settled after this Court's determination in *Spearin* that the government warrants the specifications which it imposes in contracts, the Federal Circuit found that *Spearin* did not extend to indemnify the petitioners for the tort claims against it, and that Section 707 protected the contractor only from additional costs or delays imposed by government contract, not from the risk of injury to third parties caused by use of dangerous government specifications. The Federal Circuit then compounded this error by asserting that the petitioners "voluntarily" failed to invoke the government contract defense. None of these decisions will survive scrutiny.

In sum, this case involves the misapplication of three protections that should work integrally to shield from liability government contractors doing the government's work. *Boyle*, which shields government contractors from third party tort claims, *Spearin*, which protects contractors

from defective government specifications, and the DPA, which mandates that a contractor shall not be liable for "damages . . . for any act or failure to act" resulting from compliance with orders under that Act, all have similar tests and similar justifications. The Federal Circuit failed to address the integral nature of these defenses, limited protection under the DPA, and, at the urging of the government, held that the DPA provides no protection to the petitioners.

## I. THE DEFENSE PRODUCTION ACT INDEMNIFIES THE PETITIONERS

Claiming to read the plain language of the DPA and to harmonize Sections 101 and 707 of the DPA, the Federal Circuit stated that Section 707 did not indemnify contractors for tort liability. The lower court cited no direct authority for its view that Section 707 does not extend such protection to contractors, and its view is in conflict with the text and the history of the DPA.

### A. History of the Defense Production Act

#### 1. *Historical Development*

Grants of immunity and indemnity against third party liability by the United States to its contractors are permitted by the authority conferred in the Constitution to enter into contracts[2] and to exercise "war powers."[3] When these two powers have fused, it has been necessary to protect those who contract with the government for defense-related goods from the consequences of the government's exercise of its political policy responsibilities,[4] particularly when the government has compelled production to meet war efforts.

Since before the First World War, Congress found it necessary to authorize the executive branch to compel production of goods. Congress recognized that contrac-

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[2] *Dugan v. United States*, 16 U.S. (3 Wheat.) 172 (1818).

[3] *Lichter v. United States*, 334 U.S. 742 (1948).

[4] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

tors must be immunized or indemnified from liability which might grow out of less-than-voluntary contract performance.[5] Indeed, Congress has on other occasions also recognized the need to indemnify contractors facing performance risks. *See, e.g.*, 10 U.S.C. § 2354 (1988) (providing indemnification for contracts involving hazardous activities).

During the World War I era, Congress granted certain extraordinary powers to the President to facilitate military mobilization. The National Defense Act of 1916 empowered the President in time of war or imminent war to place orders for products and materials required by the Army.[6] A similar act supported Navy procurement.[7] Compliance with these acts took precedence over any other contract. Neither act protected contractors from third-party liability.[8] Both acts required only that the United States pay just compensation to contractors for the goods conscripted.

### 2. *World War II*

The powers granted to the President during World War I expired at the cessation of hostilities. Thus, in 1940, when the situation in Europe required that the United States again mobilize for war, the President's special procurement powers were limited.

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[5] Pedrick & Springfield, *War Measures and Contract Liability*, 20 Tex. L. Rev. 71 (1949); Brown, *The Effect of Conscription of Industry on Contracts for the Sale of Goods*, 90 U. Pa. L. Rev. 533 (1942).

[6] National Defense Act of 1916, ch. 134, § 120, 39 Stat. 166, 213.

[7] Act of March 4, 1917, ch. 180, 39 Stat. 1168, 1192, *re-enacted by* Act of July 1, 1918, ch. 114, 40 Stat. 704, 719-20.

[8] Some courts recognized that compliance with a compulsory order under the National Defense Act of 1916 excused the breach of a commercial contract; the concept applied in these cases was simply that the acts of the sovereign frustrated performance of the contract. *See Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 F. 177 (2d Cir.), *cert. denied*, 253 U.S. 498 (1920).

The National Defense Act of 1940 empowered the President, for two years, to require that contractors give priority to Army and Navy contracts or orders,[9] and was later amended to give the executive authority to require contractors to give priority to orders for materials to be sent to a country deemed vital to the defense of the United States.[10] Congress also expressly immunized contractors from liability for breach of contract damages resulting from the performance of priority orders.[11] The Selective Training and Service Act of 1940[12] gave the President authority to order necessary supplies or equipment for the Army or Navy.[13]

Following the bombing of Pearl Harbor, Congress enacted the First and Second War Powers Acts. The First War Powers Act authorized the President, when necessary to "facilitate the prosecution of the war," to permit an agency exercising functions "in connection with the prosecution of the war effort . . . to enter into contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts" and regardless of the availability of appropriations.[14] The War Department relied on this broad grant of authority to assist contractors suffering financial losses

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[9] National Defense Act of 1940, ch. 440, § 2, 54 Stat. 676, 676.

[10] Act of May 31, 1941, ch. 157, 55 Stat. 236.

[11] *Id.* The legislative history of this provision recognized that manufacturers sued for damages had limited defenses to defaulted contracts, and "g[a]ve clear statutory protection to all manufacturers who comply with priority orders." H.R. Rep. No. 460, 77th Cong., 1st Sess. 6 (1941).

[12] Selective Training and Service Act of 1940, ch. 720, § 9, 54 Stat. 885, 892.

[13] *Id.* The authority conferred on the President by the Selective Training and Service Act of 1940 was identical to that of the National Defense Act of 1916.

[14] First War Powers Act, 1941, ch. 593, § 201, 55 Stat. 838, 839.

and to indemnify contractors against damages arising from the government contract.

The Second War Powers Act[15] again expanded the executive's power over defense contractors by giving the President authority to require *acceptance* of priority contracts or orders.[16] A contractor who refused to accept a contract or order faced criminal sanctions.[17] The Act expressly immunized contractors from liability for breach of contract.[18]

The Second War Powers Act and the Selective Training Service Act expired after World War II.[19] Concerned about the ability to meet the country's foreign and domestic obligations,[20] Congress enacted the Selective Service Act of 1948, which authorized the President to place orders for delivery of articles or materials required by the military forces or the Atomic Energy Commission.[21] A contractor receiving an order under the Act was required to give that order priority or face possible seizure of its plant and criminal sanctions.[22]

### B. The Korean War and the Defense Production Act of 1950

The invasion of South Korea in 1950 thrust the United States into a military crisis which continued under the

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[15] Second War Powers Act of 1942, ch. 199, § 301, 56 Stat. 176, 177.

[16] *Id.*, 56 Stat. at 178.

[17] *Id.* at 179.

[18] *See L.N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694, 701 (2d Cir. 1949), *cert. denied*, 339 U.S. 914 (1950).

[19] Second War Powers Act of 1942, *as amended by* ch. 590, 59 Stat. 658 (1945); Selective Training and Service Act of 1940, *as amended by* Act of June 29, 1946, ch. 522, 60 Stat. 341.

[20] S. Rep. No. 1268, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. Serv. 1989.

[21] Selective Service Act of 1948, ch. 625, 62 Stat. 604, 625-26.

[22] *Id.*

penumbra of the "Cold War" until the fall of the Berlin Wall. In response, Congress drafted the Defense Production Act, which was generally derived from the emergency statutes enacted during World War II.[23]

Congress' principal purpose in drafting the DPA was to provide material to the military in as short a time as possible without total disruption of a free economy.[24]

DPA Section 101, 50 U.S.C. app. § 2071, once again gave the President extraordinary powers to compel acceptance and performance of contracts vital to the national defense.[25]

During World War II, when contractors had been compelled to perform military contracts or to take unusual risks, Congress indemnified war contractors, and immunized them against liability for commercial contract defaults. By 1950, however, government contractors had no such protection. This void was filled by Section 707, a new provision much more broadly immunizing contractors from "damages . . . for any act or failure to act resulting directly or indirectly from . . . compliance with . . . this Act."[26] The Senate report accompanying the DPA stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter." S. Rep. No. 2250, 81st Cong., 2d Sess. 11 (1950).

When Congress amended Section 707 for clarity in 1952, the Senate Report accompanying the amendment again described Section 707 in broad terms:

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[23] *See Defense Production Act of 1950: Hearings on S. 3936 Before the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess. 199-200, 278-92 (1950) (side-by-side comparisons of World War II statutory language with proposed statutory language).

[24] S. Rep. No. 2250, 81st Cong., 2d Sess. 1 (1950).

[25] Defense Production Act of 1950, ch. 932, § 101, 64 Stat. 798, 799.

[26] *Id.* § 707, 64 Stat. at 818.

> The first sentence of section 707 of the act contains the so-called exculpatory clause, which protects a person from liability, under contract or otherwise, as the result of compliance with the act or regulations issued under the act. This provision was included to encourage and assist people to comply with the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases.[27]

The authority to compel acceptance and performance of contracts or orders pursuant to Section 101 has not changed significantly since its original enactment. Likewise, the immunity afforded contractors under Section 707 performing in compliance with orders under the DPA has remained unchanged since 1952.

### C. Section 707 Immunizes Contractors From Liability for Damages in Tort or Contract

By its plain language, Section 707 shields a contractor from liability for "damages . . . for any act or failure to act" resulting from compliance with the DPA.

In statutory construction cases, "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The lower court claimed to be reading this plain language when it denied recovery to the petitioners. Not so; it construed Section 707 in a manner that denies its plain meaning.

By its language, Section 707 immunizes a contractor from all liability resulting from compelled production, whether arising in contract, tort, or otherwise.

There is no indication that Section 707 was intended to excuse only liability under contractual defaults. Indeed, Congress rejected the explicit "liable . . . for any default under any contract" language of the predecessor in favor of the broader "liable . . . for any act or failure to act"

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[27] S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1789, 1818-19.

language of Section 707, providing powerful evidence to the contrary. Had Congress intended such a limitation it could very easily and simply have adopted the prior language.[28]

Second, the references to Section 707 in the DPA's legislative history are wholly consistent with the proposition that the immunity language applies to all damages or claims, whatever the legal basis. The House report stated: "This section [707] provides an exemption from damages or penalties which might result from compliance with rules, regulations, or orders issued under title I."[29] Similarly, the relevant Senate report stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter."[30] When Congress re-examined Section 707 in 1952, it stated that Section 707 "protects a person from liability, under contract *or otherwise*, as the result of compliance with the act or regulations issued under the act."[31]

In sum, the plain meaning of the provision, its legislative history, and the historical context in which it was enacted all demonstrate that Congress indeed intended Section 707 to immunize contractors from all damages resulting from compelled production.

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[28] *Compare* ch. 199, § 301, 56 Stat. at 180 *with* 50 U.S.C. app. § 2157. As previously noted, Congress has not hesitated to indemnify government contractors against the risks that result from government contract performance—even risks which the contractor's work may engender. *See* 10 U.S.C. § 2354 (1988) (providing indemnification for contracts involving hazardous activities); Atomic Energy Damages Act, 42 U.S.C. § 2014 (1988 & Supp. V 1993) (authorizing indemnification of government contractors from nuclear risks); *see also* 48 C.F.R. § 52.228-7 (1994). The Federal Circuit's view was certainly not premised on considerations of congressional policy.

[29] H.R. Rep. No. 2759, 81st Cong., 2d Sess. 22, *reprinted in* 1950 U.S.C.C.A.N. 3620, 3644.

[30] S. Rep. No. 2250, 81st Cong., 2d Sess. 11 (1950); *see* 96 Cong. Rec. 10,572 (1950).

[31] S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1789, 1818 (emphasis added).

## II. THE FEDERAL CIRCUIT'S INTERPRETATION OF THE DPA IS WHOLLY INCONSISTENT WITH *BOYLE*'S GOVERNMENT CONTRACTOR DEFENSE AND WITH INDEMNIFICATION OF CONTRACTORS FOLLOWING GOVERNMENT SPECIFICATIONS IN *SPEARIN*

As stated previously, the other shields involved in this case are the government contractor defense set forth in *Boyle* and the warranty of adequate specifications elucidated in *Spearin*. Those defenses, which involve nearly identical elements, protect the government contractor from third-party tort claims and from liabilities incurred due to reliance on government contract specifications. Section 707, which also is geared to protecting government contractors performing mandated services for the government, should be construed similarly. When properly integrated, these three defenses provide freedom from third party tort liability, indemnification for reliance on government specifications, and, under the DPA, indemnification from all liabilities incurred as a result of the contract performance. The opinion of the Federal Circuit, however, diverted from the logic of this trio of government contractor protections to hold that the DPA will not indemnify contractors for incurred liabilities. *See Hercules, Inc. v. United States*, 24 F.3d 188, 204 (Fed. Cir. 1994). This decision is not only inconsistent with the DPA's text and history, but with *Boyle* and *Spearin*.

In *Boyle*, this Court held that a contractor manufacturing products for the government is not liable in tort to third parties if:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

487 U.S. at 512.[32] These three elements are simply approval, conformance, and relative knowledge.

The first two elements of the test tie the production of the product to the government's demands. "[A] product conforms to reasonably precise specifications if it satisfies an intended configuration even if it may produce unintended and unwanted results." *Kleeman v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989) (quotations omitted), *cert. denied*, 495 U.S. 953 (1990). The contractor satisfies the third element by proving the government knew of (or at least the contractor did not conceal) a danger. *Boyle*, 487 U.S. at 512; *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 951 n.10 (4th Cir. 1989).

The *Spearin* test is similar. In *Spearin*, this Court stated that, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." 248 U.S. at 136. To succeed on an implied warranty claim, the contractor must show: (1) government specifications, (2) with which the contractor complied, and (3) unsatisfactory result. *R.C. Hedreen Co.*, ASBCA No. 20,599, 77-1 BCA ¶ 12,328, at 59,555. The contractor must show also that the government had superior knowledge of the defective specification. *Johns-Manville Corp. v. United States*, 13 Cl. Ct. 72, 118-20 (1987), *vacated on other grounds*, 855 F.2d 1571 (Fed. Cir. 1988).

It is significant that the Court's first application of the government contractor defense was actually premised on the same issues set forth in *Spearin*, *i.e.*, defective government specifications. In *Yearsley v. Ross*, 309 U.S. 18, 20-21 (1940), the Supreme Court concluded a contractor had no liability for riparian damages caused in perform-

[32] The Chamber of Commerce, as amicus curiae in *Boyle*, supported establishment of the government contractor defense. See Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Boyle v. United Technologies*, 487 U.S. 500 (1988) (No. 86-492).

ance of a government contract, because there was "no liability on the part of the contractor for executing [the government's] will." In doing so, the Court effectively created a bridge between the contract-based relief of *Spearin*, and the more broadly based relief in *Boyle* and Section 707.[33] The Federal Circuit ignored this important historical development.

In the instant case, the Federal Circuit held that the petitioners had successfully argued three times that the government contractor defense applied. *Hercules*, 24 F.3d at 199. This argument is flawed, since the government contractor defense several years prior to *Boyle* was not nearly as developed or certain as it is today. Petitioners argued the government contractor defense, but they simply did not win (or lose). *See William T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 21 (1992) (discussing the reasons for settlement). What occurred in settlement—a small payment to lay to rest hundreds of millions of dollars of potential liability—was not a giveaway but rather a recognition that the government contractor defense was uncertain.[34] Because of this uncertainty (which was fanned by government hostility to the defense at the trial court) the government contractor defense did not provide the escape from liability the court of appeals claims. The petitioners incurred liability under their Agent Orange contracts and were forced to pay damages.

That is precisely where the DPA comes in. As even the Federal Circuit recognized, the Agent Orange contracts were imposed upon the petitioners through the DPA,

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[33] Likewise, in *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965), the court found that a contractor who failed to take precautions to prevent damages during performance of a dredging contract was not liable, since "[t]he Government did not provide for such additional precautions in the plans, and [the contractor] is not to be held liable for this omission."

[34] Importantly, although the Agent Orange court (then Judge Pratt) did accept the principles of the government contractor defense, the court thereafter (then Judge Weinstein) adamantly refused to enter judgment on this basis until there was a class settlement.

they were forced to produce what the government demanded, and they thereafter suffered "liability, under contract or otherwise, as the result of compliance with the act or regulations issued under the act." S. Rep. No. 1599, *reprinted in* 1952 U.S.C.C.A.N. at 1818-19. As such, petitioners are entitled to be compensated.

Unfortunately, rather than reading the DPA, the government contractor defense and the *Spearin* doctrine together, the Federal Circuit read them as providing different and inconsistent bases for relief. *See Hercules*, 24 F.3d at 197. However, as the Chamber of Commerce has shown, these three doctrines have nearly identical standards and rationales. They must be read together, and not as mutually exclusive, in order to fulfill Congress' expectation that contractors doing the government's bidding should not be forced to bear costs imposed by the government's decisions.

## III. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 707 WOULD PERMIT THE GOVERNMENT TO IMPOSE ONEROUS CONTRACTS FOR HAZARDOUS PRODUCTS ON CONTRACTORS, WHILE FORCING THE CONTRACTORS TO BEAR THE CONSEQUENCES OF THESE DECISIONS

While this appeal does not question the constitutional appropriateness of the War Powers or Defense Production Acts, it must be noted that these acts give the government extraordinary power to compel contractor compliance with executive demands. Because of these powers, the freedom to negotiate, a crucial aspect of traditional contract theory and interpretation, is missing. As the Federal Circuit itself recognizes, "the Government routinely grants itself privileges—like the right to terminate a contract for the Government's convenience without penalty—that are not available to other contracting parties." *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1079 (Fed. Cir. 1993) (Plager, J., concurring). There can be no pretense that contracts with the government are bargained for and executed with equal bargaining power on both sides, and it is well accepted that they are in fact contracts of adhesion.

It is clear that the government has the power to impose contracts entirely against the will of a private party, or, at best, on a take-it-or-leave-it basis. Such contracts cannot be viewed through the lens of traditional common-law rules, since "such a contract is 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather." *Schwartz v. S.S. Nassau*, 345 F.2d 465, 471 (2d Cir.) (quotation omitted), *cert. denied*, 382 U.S. 919 (1965); *see also* Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173 (1983).

The Agent Orange contracts were compulsory, not voluntary. The government drafted the contracts pursuant to the DPA and supplied all specifications. The contractors had no bargaining power at all. Indeed, the contracts at issue cannot even be said to have been let merely on a take-it-or-leave-it basis, but on a "take-it-or-go-to-jail" basis. The contractor could not refuse to produce Agent Orange, demand to produce a safer defoliant, or make one that it felt was more effective. Petitioners had to produce what the government demanded not through negotiation, but submission.[35]

This enormous disparity in contracting power illustrates the rationale for the indemnity provision of Section 707. Where contracting parties negotiate terms and reach a meeting of the minds, they may allocate the risk (and the price) of consequential damages.

In the instant case, however, the contractors had no such option. They were not able to negotiate liability issues because they were ordered to produce what the government demanded. *See Hercules*, 24 F.3d at 190. Moreover, the potential danger of Agent Orange was known solely to the government. The contractors were making a product, under government order, with unknown dan-

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[35] Worse yet, in this case, the government knew that the product potentially was dangerous; it ordered that the product not be labeled as such; and it then knowingly placed military service personnel in harm's way by exposing them to the product. The petitioners had no control over any of these decisions.

gers, unknown liability concerns, and neither the knowledge nor the power to protect themselves from liability. *See William T. Thompson*, 26 Cl. Ct. at 20-21 (Thompson had no input regarding Agent Orange specifications and government's level of knowledge exceeded Thompson's).

The Federal Circuit's view of Section 707 studiously ignores these issues, and is analogous to instances in which parties enter into a contract of adhesion and the drafter attempts to exculpate himself from liability while prohibiting the draftee from protecting himself.[36]

In this case, fundamental fairness requires that the government not be permitted to escape liability for damages suffered by the contractors through third-party actions.[37] The government's actions (and the rulings of the district court) wrongly insulate the government from its own conduct. The reasonable expectations of the contractors were that they would be indemnified for actions taken on behalf of the government—by the *Spearin* doctrine for contract claims, by the *Boyle* government contractor defense for third-party tort claims, and by Section 707 for other liabilities incurred in contract performance. These reasonable expectations are being frustrated by the government's attempt to avoid its statutory liabilities under Section 707.

Further, in imposing the Agent Orange contracts on the petitioners, the government essentially took over petitioners' plants. The petitioners effectively lost the right to their physical plant; the choice of whether or not to engage in business; the choice of what to produce; and the

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[36] Such juxtaposition is all the more egregious in this case because the government opposed the government contractor defense in the trial court and now invokes that defense as a shield.

[37] The Court has stated "where the contract is one of adhesion, where there is great disparity in bargaining power, . . . other legal consequences may ensue." *D.H. Overmyer Co., Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 188 (1972).

choice of what market to enter.[38] Were it not for the protection provided by *Spearin*, *Boyle* and Section 707, these actions would violate the Fifth Amendment prohibitions against government seizure of private property without just compensation.

The government may not force private entities to bear the costs of public benefits. This principle is basic to democratic government. As one of the founders observed, "[g]overnment is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*." James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed. 1906), *quoted in Winstar Corp. v. United States*, 25 Cl. Ct. 541, 548 (1992), *rev'd, petition for reh'g in banc accepted, vacated*, 994 F.2d 797 (Fed. Cir. 1993). To view Section 707 as permitting the government to force liability, as well as production, upon a contractor would be inconsistent with its historical meaning and with other doctrines protecting contractors from liability, and offend basic notions of the sanctity of property from government seizure. For constitutional as well as legal reasons, the Federal Circuit's decision that the DPA provides indemnity only against third-party breach of contract claims must be rejected.

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[38] In this regard *see FMC Corp. v. United States Department of Commerce*, 29 F.3d 833, 844 (3d Cir. 1994) (government exerted such pervasive control over contractor in ordering it to produce synthetic rubber products that government had operator liability under CERCLA); *see also Holodnak v. Avco Corp.*, 514 F.2d 285, 289 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) (government insinuated itself to such an extent into business of contractor that it was a "joint participant" in contractor activities).

## IV. THE GOVERNMENT'S ACTIONS ARE PART OF A PATTERN TO AVOID LIABILITY FOR THE CONSEQUENCES OF ITS WARTIME CONTRACTS

In the instant case, the government has sought to avoid indemnifying the petitioners under contracts it imposed pursuant to the DPA. While this may seem inconsistent with the government's current position that contractors are immune from government contract liability under *Boyle*, it is consistent with the government's attempts, in this forum and in many others, to avoid the costs of its past decisions, costs which in many cases are only now becoming clear.[39] Now that the government is realizing the cost implications of its compulsory contracts for hazardous materials critical to various defense efforts, it has sought to shift these costs of its policies to the private entities which were compelled to place these policies into effect.

The DPA is not the only act placing liability for public policy on the government. The government faces the same threat, and has reacted similarly, in other contexts. For example, in the environmental context, the government has sought to avoid liability under the Comprehensive En-

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[39] Before the district court, the government attacked the government contractor defense, which it then championed to the court of appeals. Such defense could also be estopped under the doctrine of inconsistent positions. When "the party against whom estoppel is invoked received some benefit from the previously taken position, i.e., he 'won' because of it and seeks to 'win again' from his original adversary (or one in privity with that person or involved in the same transaction) on a basis which contradicts the prior position," the doctine will apply. *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1579-80 (Fed. Cir. 1984).

The requirements for the doctrine are reliance and prejudice. *Id.* at 1580. The reliance component is the same as in a traditional reliance claim. *See id.* at 1579-80. The prejudice component is the detriment incurred by that reliance. *Id.* The underlying concern with the doctrine is abuse of the judicial system through clever, amoral advocacy. Litigants are to be discouraged from playing " 'fast and loose' with the judicial process." 1B James W. Moore et al., *Moore's Federal Practice* § 0.405[8], at III-55 (2d ed. 1994); *Scarano v. Central R.R. of N.J.*, 203 F.2d 510 (3d Cir. 1953).

vironmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (1988). An interesting, albeit unsuccessful government attempt to avoid such liability arose recently in *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994).

*FMC* involved World War II synthetic rubber production contracts with a number of companies produced at a plant over which the government exerted considerable control. As in the instant case, in *FMC* the government used its wartime powers to compel production of war materials. *FMC Corp. v. United States Dep't of Commerce*, 786 F. Supp. 471, 474-75 (E.D. Pa. 1992).

Years later, the Environmental Protection Agency sought to recover the costs of cleaning up production waste that remained at the plant from a subsequent owner, FMC Corporation. FMC sought contribution under CERCLA from the government, claiming that the hazardous waste was due to wartime government contracts. The government raised a number of jurisdictional and substantive challenges to FMC's contribution claims.

In a divided en banc opinion, the Third Circuit held that the government had waived sovereign immunity to liability under CERCLA, and that given the extent of government control over the facility, it shared liability for environmental clean up. In chiding the government for its assertion that a finding of governmental liability would result in costs far in excess of anything Congress could have intended under CERCLA, the Court noted, "we point out that at bottom our result simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor consistent with the policy underlying CERCLA." *FMC*, 29 F.3d at 846; *see also Elf Atochem N. Am., Inc. v. United States*, 868 F. Supp. 707, 712-13 (E.D. Pa. 1994) (United States unsuccessfully contends that World War II-era pollution at chemical plant could not implicate government under CERCLA; cleanup liability imposed).[40]

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[40] In different factual circumstances, the government has avoided CERCLA liability by arguing it had insufficient control to be liable

The government's actions in *FMC* are a primer to its actions here. In the instant case, the government, through the DPA, required production of Agent Orange, which it deemed necessary to the war effort in Vietnam. As a direct result of these required production contracts, the petitioners at bar suffered liability. For the United States to avoid the costs of the consequences of these contracts would be neither fair nor consistent with the requirements of the DPA and its underlying policy.

## CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

HERBERT L. FENSTER *
HUGO TEUFEL
SCOTT S. EVANS
RAY M. ARAGON
MCKENNA & CUNEO
370 17th Street, Suite 4800
Denver, Colorado 80202
(303) 634-4000

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as an operator or arranger at a former Agent Orange plant. In *United States v. Vertac Chemical Corp.*, 1995 U.S. App. Lexis 1754 (8th Cir. Jan. 31, 1995), the Eighth Circuit reviewed the history of the plant, formerly operated by Hercules. While finding the rated contracts issued to Hercules were "substantially dictated by [the government]," the court also found that the government did not own the raw materials, and that Hercules' contracts did not address the disposal of wastes. *Id.* at *6-*7. Since the government's "actual involvement" at the facility was "sporadic and minimal," the government could not be held liable as an arranger. *Id.* at *24. The court of appeals also adopted the Federal Circuit's view that the DPA does not provide general indemnity for government contractors. *Id.* at *27.

Of course, the *Vertac* analysis is inapplicable here, for it is undisputed in the instant case that the government mandated the composition and production of Agent Orange. It is useful, however, as an example of the government's efforts to limit liability for damages caused under its DPA contracts.

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
*Attorneys for Amicus Curiae*
*The Chamber of Commerce of*
*the United States of America*

* Counsel of Record

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